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# Teoh Kim Heng v Tan Ong Ban

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–2400–09 OF 2011
ABDUL MALIK ISHAK, ABDUL WAHAB PATAIL AND AZIAH ALI JJCA
9 MAY 2014

*Land Law — Indefeasibility of title and interests — Good faith and valuable consideration — Whether subsequent purchaser of property proved he was bona fide purchaser for value without notice — Whether purchaser acquired indefeasible title — National Land Code s 340*

The respondent ('Tan') entered into a sale and purchase agreement ('the first SPA') with a developer and paid a RM5,250 as deposit in the year 1996 to buy an apartment ('the property'). Construction of the property was abandoned at certain stages and was delayed and the respondent did not make any further payments towards its purchase. In 2004, Tan received a letter from another company purporting to represent the developer, informing him that the first SPA had been terminated and enclosing a cheque in refund of his deposit. Tan objected to the supposed termination and returned the cheque but the company re-asserted the termination and returned the cheque to Tan. Two years later, Tan visited the property to find the appellant ('Teoh') carrying out renovation works at the premises. Tan issued a legal notice claiming he was the beneficial owner of the property and demanded Teoh vacate the premises. Tan sued Teoh and the developer in the High Court seeking various declaratory orders including that the termination of the first SPA was invalid and that it was still legally enforceable; that any subsequent SPA entered into by the developer with any other party with respect to the property was invalid; that he was the rightful owner of the property and that Teoh should forthwith deliver to him vacant possession of the property and transfer the strata title to his name. The developer, which by then went into liquidation, did not defend the suit in the High Court. Teoh claimed he obtained possession of the property after he signed an SPA ('the third SPA') with one Mohd Ismail in 2004 for its purchase and had paid the full purchase price for it. Teoh said Mohd Ismail, with the developer's consent, had assigned to him all his rights over the property. The facts showed that by a SPA in 2002 ('the second SPA') Mohd Ismail had bought the property from the developer. Teoh claimed he was a bona fide purchaser for value and was neither party nor privy to the first nor the second SPA. The High Court decided in Tan's favour holding that, inter alia, Teoh did not acquire any interest in the property as he failed to prove he had fully paid the purchase price; the second SPA between Mohd Ismail and the developer was null and void because it did not have the consent and signature

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of the proprietor of the land; the third SPA between Mohd Ismail and Teoh was invalid and Mohd Ismail could not pass to Teoh title he did not possess; and that Tan's first SPA with the developer was valid and subsisting.

**Held,** allowing the appeal and setting aside the decision of the High Court:

(1) It was clear from the evidence that the appellant was a subsequent purchaser and he had shown that he was a bona fide purchaser for value without notice. He was therefore clothed with the statutory protection accorded by s 340 of the National Land Code. Consequently, the appellant had acquired an indefeasible title to the property (see paras 18 & 23).

(2) There was no evidence to show the appellant had acted in concert with Mohd Ismail to effect the disposition of the property. It was apparent the appellant had no knowledge about the first and the second SPA. He knew about the property being for sale from a broker. He did not at the time know Mohd Ismail was the owner. Before executing the third SPA the appellant inspected the property with the broker and found it to be in good condition and unoccupied. He also knew the certificate of fitness had been issued. He agreed to buy the property at the price asked for by Mohd Ismail and took possession of the property in 2005 (see paras 22 & 20).

(3) The respondent disputed the appellant's contention that he had paid the full purchase price to Mohd Ismail. However, there was no evidence Mohd Ismail had instituted any action against the appellant for payment of the balance of the purchase price. The fact the appellant was in possession of the property was also not challenged. There was sufficient evidence to show the SPA between the appellant and Mohd Ismail had been completed (see para 21).

**[Bahasa Malaysia summary**

Responden ('Tan') memasuki perjanjian jual beli ('PJB pertama') dengan pemaju dan membayar RM5,250 sebagai deposit pada tahun 1996 untuk membeli sebuah apartmen ('hartanah'). Pembinaan hartanah telah ditinggalkan pada peringkat tertentu dan telah ditangguh dan responden tidak membuat apa-apa bayaran lanjut terhadap pembeliannya. Pada tahun 2004, Tan menerima satu surat daripada satu lagi syarikat yang mengaku sebagai wakil pemaju, memaklumkan kepadanya bahawa PJB pertama telah ditamatkan dan menyertakan satu cek mengembalikan depositnya. Tan membantah terhadap penamatan yang dikatakan dan mengembalikan cek tersebut tetapi syarikat itu menegaskan penamatan dan mengembalikan cek tersebut kepada Tan. Dua tahun kemudian, Tan pergi melihat hartanah itu dan mendapati perayu ('Teoh') sedang menjalankan kerja-kerja ubah suai di premis itu. Tan mengeluarkan satu notis undang-undang menuntut bahawa dia

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adalah pemilik benefisial hartanah dan menuntut Teoh untuk mengosongkan premis. Tan mendakwa Teoh dan pemaju di Mahkamah Tinggi memohon pelbagai perintah deklarasi termasuk bahawa penamatan PJB pertama adalah tidak sah dan bahawa ia masih boleh dikuatkuasakan di sisi undang-undang; bahawa apa-apa PJB selepasnya yang dimasuki oleh pemaju dengan pihak lain berkaitan dengan hartanah itu adalah tidak sah; bahawa dia adalah pemilik sah hartanah tersebut dan bahawa Teoh hendaklah dengan serta-merta menyerahkan milikan kosong hartanah itu dan memindahkan hak milik strata atas namanya. Pemaju, yang pada masa itu dibubarkan, tidak membela guaman itu di Mahkamah Tinggi. Teoh mendakwa telah memperolehi milikan harta itu selepas dia menandatangani PJB ('PJB ketiga') dengan seorang yang bernama Mohd Ismail pada tahun 2004 untuk pembelian dan telah membayar harga pembelian penuh untuk pembeliannya. Teoh berkata, Mohd Ismail, dengan kebenaran pemaju, telah menyerahhak kepadanya kesemua hak atas hartanah itu. Fakta menunjukkan bahawa melalui PJB tahun 2002 ('PJB kedua') Mohd Ismail telah membeli hartanah itu daripada pemaju. Teoh mendakwa bahawa dia adalah pembeli *bona fide* untuk nilai dan adalah bukan pihak mahupun privi kepada PJB pertama ataupun kedua. Mahkamah Tinggi memutuskan memihak kepada Tan dengan memutuskan, antara lain, Teoh tidak mendapat apa-apa faedah dalam hartanah kerana dia gagal untuk membuktikan dia telah membayar jumlah penuh harga belian; PJB kedua antara Mohd Ismail dan pemaju adalah tidak sah dan terbatal kerana ia tidak mempunyai kebenaran dan tandatangan tuan punya tanah; PJB ketiga antara Mohd Ismail dan Teoh adalah tidak sah dan Mohd Ismail tidak boleh memberikan kepada Teoh hak milik yang tidak dimilikinya; dan bahawa PJB pertama Tan dengan pemaju adalah sah dan masih berkuat kuasa.

**Diputuskan**, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Adalah jelas daripada keterangan bahawa perayu adalah pembeli seterusnya dan dia telah menunjukkan bahawa dia adalah pembeli *bona fide* bagi nilai tanpa notis. Dia oleh itu adalah dilindungi dengan perlindungan statutori menurut s 340 Kanun Tanah Negara. Akibatnya, perayu telah memperolehi hak milik tak boleh sangkal terhadap hartanah itu (lihat perenggan 18 & 23).

(2) Tiada keterangan untuk menunjukkan bahawa perayu telah bertindak bersama-sama dengan Mohd Ismail untuk melakukan pelupusan harta itu. Ia adalah jelas perayu tidak mempunyai pengetahuan tentang PJB pertama dan kedua. Dia mengetahui tentang hartanah itu hendak dijual daripada seorang broker. Dia tidak pada masa itu mengetahui Mohd Ismail adalah pemilik hartanah itu. Sebelum melaksanakan PJB ketiga perayu telah memeriksa hartanah dengan broker dan mendapati ia berada dalam keadaan yang baik dan tidak berpenghuni. Dia juga mengetahui perakuan kelayakan telah dikeluarkan. Dia bersetuju untuk

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membeli hartanah pada harga yang ditetapkan oleh Mohd Ismail dan mengambil milikan terhadap hartanah itu pada tahun 2005 (lihat perenggan 22 & 20).

(3) Responden mempertikaikan hujahan perayu bahawa dia telah membayar harga belian penuh kepada Mohd Ismail. Walau bagaimanapun, tidak ada keterangan Mohd Ismail telah memulakan apa-apa tindakan terhadap perayu untuk pembayaran baki harga belian. Fakta bahawa pemohon mempunyai milikan harta itu juga tidak dicabar. Terdapat bukti yang mencukupi untuk menunjukkan SPA antara perayu dan Mohd Ismail telah dsempurnakan (lihat perenggan 21). ]

**Notes**

For a case on good faith and valueable consideration, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 3534.

**Cases referred to**

*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 CLJ 609, CA (refd)

*Yap Ham Seow v Fatimawati bt Ismail & Ors and another appeal* [2014] 1 MLJ 645; [2013] 9 CLJ 577, CA (refd)

**Legislation referred to**

National Land Code s 340

**Appeal from**: Civil Suit No 22–442 of 2005 [MT2] (High Court, Pulau Pinang)

*Simon Murali (Lio & Partners) for the appellant.*
*Saw Lip Khai (Chooi, Saw & Lim) for the respondent.*

**Aziah Ali JCA (delivering judgment of the court):**

SALIENT FACTS

**[1]** The appellant Teoh Kim Heng, (the first defendant in the court below), had entered into a sale and purchase agreement dated 31 May 2004 ('the third SPA') with one Mohd Ismail bin Md Ibrahim ('Mohd Ismail') for the sale of premises known as Unit 15-6, Level 15, Building No Block A at Villa Mas Ewani Apartments, Bandar Jelutong, Penang ('the property').

**[2]** Mohd Ismail had earlier purchased the property from the developer Juara Aspirasi (M) Sdn Bhd (the second defendant in the court below), vide a sale and purchase agreement dated 1 November 2002 ('the second SPA').

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**[3]** The respondent Tan Ong Ban, (the plaintiff in the court below), claims that he had purchased the property from the developer vide a sale and purchase agreement dated 3 July 1996 ('the first SPA') and had paid RM5,250 as deposit. However the project was abandoned at certain stages and delayed. No further payments were made.

**[4]** In 2006 when the respondent visited the property he discovered that the appellant was carrying out renovation works on the property. He then issued a notice through his solicitor to the appellant demanding the appellant vacate the property. The respondent claims that he is the beneficial owner of the property and that the appellant has trespassed onto the property.

**[5]** In the amended statement of claim, the respondent states that he had received a letter dated 12 May 2004 from 'Januari Properties Sdn Bhd', purportedly representing the developer, informing him that the first SPA had been terminated and enclosing a cheque for RM5,250. By a letter through his solicitor dated 19 May 2004, the respondent objected to the termination, inter alia, on the ground that the developer had no valid reason to terminate the first SPA. He returned the cheque to the developer. However by another letter dated 3 June 2004 the developer asserted the termination and again enclosed the said cheque.

**[6]** The respondent contends that the first SPA between him and the developer was valid and enforceable and that the developer had no right to sell the property to any other party. However the respondent did not take any further step to challenge the termination by the developer until the year 2010 when the High Court allowed his application to add the developer as the second defendant.

**[7]** The appellant in his defence claims that he has paid the full purchase price to Mohd Ismail and Mohd Ismail had, with the consent of the developer, assigned all rights over the property to him vide a deed of assignment dated 20 May 2005. Upon obtaining possession, he commenced renovation works. The appellant claims that he is a bona fide purchaser for value. He was neither a party nor privy to the first and second SPA.

THE RESPONDENT/PLAINTIFF'S CLAIM

**[8]** In his suit, the respondent sought for, inter alia, the following reliefs:

(a) a declaration that the termination of the sale and purchase agreement by the developer on 3 June 2004 is invalid;

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(b) a declaration that the sale and purchase agreement dated 3 July 1996 between the respondent and the developer is still valid and legally enforceable;

(c) a declaration that any sale and purchase agreement entered into between the developer and another party after 3 July 1996 is invalid;

(d) a declaration that any sale and purchase agreement entered into by the appellant in respect of the property is invalid;

(e) a declaration that the respondent is the rightful owner of the property based on the sale and purchase agreement dated 3 July 1996;

(f) an order that the appellant transfer the strata title to the property to the respondent;

(g) an injunction to prohibit the appellant from entering the property; and

(h) an order that the appellant deliver vacant possession of the property to the respondent immediately.

**[9]** It must be mentioned that the developer was in liquidation and was represented at the High Court by an officer from the Insolvency Department who took the stand not to defend the suit. No statement of defence was filed on behalf of the developer. No witnesses were called for the developer, but a former director and shareholder of the developer was called as a witness for the appellant.

## THE DECISION OF THE HIGH COURT

**[10]** The learned judge decided in favour of the respondent. Essentially His Lordship decided as follows:

(a) the respondent had not fully paid the purchase price and the strata title to the property has yet to be issued, therefore the respondent has no beneficial interest over the property;

(b) the first SPA between the developer and the respondent is still valid and subsisting and the respondent has clearly acquired a legal right over the property;

(c) the second SPA between the developer and Mohd Ismail is null and void because it was executed without the consent and signature of Goldencolt, the proprietor of the land;

(d) Mohd Ismail could not pass over the property which he did not possess to the appellant;

(e) the third SPA between Mohd Ismail and the appellant is invalid;

(f) the appellant is not protected by the doctrine of bona fide purchaser as he

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had failed to prove that he had fully paid the purchase price because Mohd Ismail was not called to confirm the fact; and

(g) the appellant did not acquire any interest on the property from Mohd Ismail.

**[11]** Dissatisfied with the decision of the learned judge, the appellant filed this appeal against the whole judgment of the learned judge. No appeal was filed by the developer.

**[12]** We have perused the appeal records and considered the submissions made by both parties. Having considered the evidence before us, we agreed with learned counsel for the appellant that, on the evidence, the appellant is a bona fide purchaser for value. We therefore allowed the appellant's appeal. The judgment of the High Court in respect of the appellant is set aside. We award costs of RM20,000 here and below. The deposit was ordered to be refunded. We give our reasons below.

THE APPEAL

**[13]** The respondent's claim is premised on the contention that the first SPA is still valid and subsisting and the termination of the first SPA by the developer is invalid. Consequently the second and the third SPA are null and void.

**[14]** As we have mentioned earlier, the developer did not defend the suit. No statement of defence was filed. It is a well settled principle that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually treated as an admission by him of the fact so asserted (*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 CLJ 609). Hence the claim by the respondent that the termination of the first SPA by the developer is invalid and that the said SPA remains valid and subsisting stands unchallenged.

**[15]** Insofar as the claim by the respondent against the appellant is concerned, the facts show that the second SPA between the developer and Mohd Ismail was entered into on 1 November 2002. The certificate of fitness for the property was issued on 7 February 2004 (p 331 of the appeal record).

**[16]** The third SPA between Mohd Ismail and the appellant was entered into on 31 May 2004. At the material time strata title has not been issued.

**[17]** The issue before us is whether there is sufficient evidence to support the appellant's contention that he is a bona fide purchaser for value without notice.

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**[18]** On the evidence it is clear that the appellant is a subsequent purchaser. Being a subsequent purchaser, the appellant would obtain an indefeasible title if he could prove that he was a purchaser in good faith for valuable consideration. This is a statutory protection accorded by s 340 of the National Land Code ('the NLC'). The burden of proving that there was a valuable consideration and good faith in the conveyance of the property lies on the appellant (see *Yap Ham Seow v Fatimawati bt Ismail & Ors and another appeal* [2014] 1 MLJ 645; [2013] 9 CLJ 577).

**[19]** Section 340 of the NLC states as follows:

> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible:
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested;
>
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchase.

**[20]** We have perused the testimony of the appellant. According to him he runs a coffee shop and he was acquainted with Mohd Ismail because Mohd Ismail patronised his coffee shop. However he knew about the property being for sale not from Mohd Ismail but from a broker. Prior to this he did not know that Mohd Ismail was the owner of the property and he was not privy to the first SPA or the second SPA. Before executing the third SPA, he had inspected the property with the broker and found it to be in good condition and

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A unoccupied. He also knew that the certificate of fitness had been issued. He then contacted Mohd Ismail and asked for a discount on the purchase price but Mohd Ismail refused. He agreed to buy the property at the price asked for by Mohd Ismail. He took possession of the property in 2005.

B **[21]** The appellant says that he has paid the full purchase price to Mohd Ismail. The respondent disputes this. However there is no evidence that Mohd Ismail has instituted any action against the appellant for payment of the balance of the purchase price. Further the fact that the appellant is in possession of the property is not challenged. We are of the considered view that there is
C sufficient evidence to show that the sale and purchase transaction between the appellant and Mohd Ismail has been completed.

**[22]** We find no evidence to show that the appellant had acted in concert with Mohd Ismail to effect the disposition of the property. It is apparent that
D the appellant had no knowledge about the first and second SPA.

**[23]** We find that the appellant has shown that he was a bona fide purchaser for value without notice and therefore he is clothed with the statutory
E protection accorded by s 340 of the NLC. Consequently the appellant has acquired an indefeasible title to the property. We agree with learned counsel for the appellant that the respondent's remedy would be against the developer for breach of contract.

F **[24]** For the aforesaid reasons we allowed the appeal with costs.

*Appeal allowed and decision of the High Court set aside.*

Reported by Ashok Kumar

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